

DOCUMENT RESUME

02659 - [A572664]

[Right of the United States to Collect Tax Indebtedness of a Contractor]. B-189125. June 7, 1977. 2 pp.

Decision re: International Fidelity Insurance Co.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel: Procurement Law II.

Budget Function: National Defense: Department of Defense - Procurement & Contracts (058).

Organization Concerned: Department of the Army: Corps of Engineers; Robco Associates; Internal Revenue Service.

Authority: Miller Act. 54 Comp. Gen. 823. Fireman's Fund Insurance Co. v. United States, 421 F.2d 706, 708, 190. United States Fidelity and Guaranty Co. v. United States, 475 F.2d 1377.

The Army Corps of Engineers requested an advance decision regarding whether a tax levy against a contractor has priority over a claim for amounts due under the contract by the contractor's Miller Act payment bond surety. The right of the United States to collect the tax indebtedness of a contractor by offsetting against the balance due under a Government contract is superior to the claim of payment bond surety. (Author/SC)

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# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

Bain  
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FILE: B-189125

DATE: June 7, 1977

MATTER OF: International Fidelity Insurance Co.

## DIGEST:

Right of United States to collect tax indebtedness of contractor by offsetting against balance due under Government contract is superior to claim of payment bond surety.

The Corps of Engineers, Department of the Army, has requested an advance decision regarding whether a tax levy against a contractor has priority over a claim for amounts due under the contract by the contractor's Miller Act payment bond surety.

The subject fixed price construction contract was awarded to Robco Associates (Robco) on May 17, 1974. Robco furnished a Miller Act payment bond in the initial penal sum of \$51,600, on which International Fidelity Insurance Company (International) was the surety. All work under the contract was completed by Robco in December 1974, and all amounts due to the contractor have been paid by the Government except for the sum of \$1,000.00, which was retained under the standard payment clause of the contract.

The Internal Revenue Service (IRS) has claimed the \$1,000.00 retainage in partial satisfaction of an outstanding tax lien levied against Robco in the amount of \$29,361.19. However, attorneys for International, the payment bond surety, have requested that the balance due by the Government to Robco be retained in order to pay International, as subrogee of Robco, for all claims paid by International to laborers and materialmen of Robco. International's attorneys assert that the IRS notice of levy does not take precedence over any claim of the surety because the surety succeeds to the contract retainage by virtue of subrogation to the rights of those materialmen and subcontractors paid by the surety.

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By paying claims of laborers and materialmen of Robco, International succeeds by right of subrogation to Robco's claim for the unpaid balance of \$1,000.00 due from the Government. Fireman's Fund Insurance Company v. United States, 421 F.2d 706, 708; 190 Ct. Cl. 804 (1970). However, it is well settled that the right of the United States to collect taxes or other debts of the contractor by offsetting the obligations against retainage under a Government contract is superior to the claims of a payment bond surety arising from its payments to the contractor's laborers and materialmen. See Mora-Landis Contractors; Fireman's Fund Insurance Co., B-187903, December 21, 1976, 76-2 CPD 517; 54 Comp. Gen. 823 (1975); United States Fidelity & Guaranty Co. v. United States, 475 F.2d 1377, 1383; 201 Ct. Cl. 1, 13 (1973).

We conclude that the IRS tax lien has priority over the claim by the payment bond surety. Accordingly, the balance remaining under the contract should be paid to the IRS in partial satisfaction of the tax lien levied against the contractor.

*By [Signature]*  
Deputy Comptroller General  
of the United States